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Public Prosecutor v Khamis bin Keli (M) & Ors

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HIGH COURT (BINTULU) — CRIMINAL CASE NO BTU-45 302–1/3 OF 2013
STEPHEN CHUNG J
5 FEBRUARY 2014

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Criminal Law — Penal Code — s 302 — Murder — Seven accused persons charged for causing death of deceased — Deceased beaten to death by a group of people — Sole eye witness unable to satisfactorily identify accused persons — Whether identification evidence of good quality and satisfied Turnbull guidelines — Unexplained discrepancies in evidence of sole eye witness — No motive adduced for attack on deceased — Failure to prove common intention — Accused acquitted

D

Evidence — Admissibility — Information leading to fact discovered — Accused charged with murder — Accused gave information leading to discovery of motorcycle and helmet — Whether relevant and admissible evidence — Whether admission by accused that he had hit the deceased was admissible under s 27 of the Evidence Act 1950 — Evidence Act 1950 s 27

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Evidence — Identification evidence — Quality of identification evidence — Whether identification evidence of good quality and satisfied Turnbull guidelines — Three step test distilled from Turnbull guidelines

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The seven accused persons were charged for causing the death of Nabinoh ak Meta ('the deceased') under s 302 read with s 34 of the Penal Code. PW1 was the wife of the deceased and the only eye witness. She testified that she and the deceased had gone to the Ta Kiong Supermarket to look for their son who had not returned home. PW1 said that they were standing in front of Ta Kiong when a group of people came near them and one of the male persons in the group asked her husband 'cari apa boss?' and her husband answered that they were looking for their son. PW1 said that the person suddenly hit her husband on the face using a helmet causing him to fall on his back onto the road. PW1 was scared and ran away. PW1 testified that when she looked back, she saw a person holding a stick and all of them stepping on her husband who was then lying on the ground. She said that she ran to nearby Mastama Inn where she met an old Malay man who gave his mobile phone which she used to call her daughter asking her daughter to call the police. When PW1 returned to the scene, her husband had died. The crux of the defence was whether PW1 had

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correctly identified the seven accused persons as the persons who had inflicted the injuries on the deceased on that night. PW1 testified that she had identified the seven accused during identification parades conducted by the police. The prosecution's case depended wholly or substantially on the correctness or otherwise of the identification of the accused by PW1. PW5 (a police officer) had interrogated the first accused and PW5 said that the first accused told him 'saya telah memukul mangsa dengan topi keledar saya yang sekarang berada di rumah, saya boleh menunjukkan tempatnya'.

Held, acquitting and discharging the accused persons:

(1) The court should warn itself whether PW1 had correctly identified or made any mistake in the identification of the accused persons as the group of persons who had assaulted the deceased on that night; *R v Turnbull and others* [1976] 3 All ER 549 and *Thenegaran a/l Murugan & Anor v Public Prosecutor* [2013] 2 MLJ 855 referred (see para 14).

(2) The *Turnbull* guidelines have been distilled into a three-step test. The first question which a judge should ask when there is identification evidence is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken. If so, the second question is whether the identification evidence is of good quality, taking into account the circumstances in which the identification by the witness was made. Where the quality of the identification evidence is poor, the judge should go on to ask the third question ie whether is there any other evidence which goes to support the correctness of the identification. If the judge is unable to find other supporting evidence for the identification evidence, he should be mindful that a conviction which relies on such poor identification evidence would be unsafe; *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142 and *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49 referred (see para 15).

(3) PW1 could not give the approximate distance between her and the group of persons when she glanced back to look while she was running. She did not testify that she was able or could identify or describe any of them from that distance. PW1 did not know any of the persons in the group. They were complete strangers to her. During her testimony in court she pointed to all the accused persons who were sitting in the dock as the persons who were responsible for the death of her husband. PW1 did not and could not separately identify each of the accused in the dock. PW1 also did not and could not separately identify the persons who had stepped on her husband or the person who was carrying a stick (see paras 19–21 & 23).

(4) PW1 testified that one of the persons in the group had hit her husband with a white helmet and while she was running away she saw this group

of persons step on her husband and one of them was carrying a stick. However, PW1 in her police report stated that after her husband had replied 'cari anak', the group of male persons immediately hit her husband using a helmet and wood. After that they struggled and she ran away. What she had said in her police report contradicted her evidence during her testimony. PW1 and the prosecution did not explain these discrepancies. This raised serious doubts on her testimony of the incident on that night, including her identification of the group of persons which was the crux of the prosecution's case against the seven accused persons (see paras 37–39).

(5) Further, PW1 had testified that after she came out of Mastama Inn, she met an old Malay man who helped her by giving his mobile phone for her to call her daughter. This allegedly 'old Malay man' was PW6, who was a security guard and 23 years old only. He could not be that 'old Malay man'. It again raised doubts on her identification or recognition of persons involved (see para 40).

(6) PW5 did not testify what were the questions put to the first accused by him which made the first accused tell him that he had hit the victim with the helmet. What were said by both of them during the interrogation were not written down or recorded. Although it was not required to be written down or recorded, the courts should be vigilant to ensure the credibility of evidence by the police personnel which is so vulnerable to abuse; *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 referred (see para 49).

(7) PW5 went to the house of the first accused to seize the motorcycle and the helmet based on the information given by the first accused. This information was admissible under s 27 of the Evidence Act 1950 ('the Act'). The first part of the statement 'saya telah memukul mangsa dengan topi keledar saya' was not necessary to the information that distinctly led to the discovery and seizure of the helmet. The first part of the statement was not within the province of s 27 of the Act, was prejudicial and also not admissible under s 113(1) of the Criminal Procedure Code (see para 50).

(8) The prosecution did not adduce any motive for the assault which had resulted in the death of the deceased. There was no evidence that the seven accused had formed any common intention or any motive to inflict injuries on the deceased and in causing the death of the deceased (see para 59).

[Bahasa Malaysia summary

Tujuh tertuduh telah dituduh kerana menyebabkan kematian Nabinoh ak Meta ('si mati') di bawah s 302 dibaca dengan s 34 Kanun Keseksaan. PW1 adalah isteri si mati dan satu-satunya saksi utama. Dia telah memberi

keterangan bahawa dia dan si mati telah pergi ke Pasaraya Ta Kiong untuk mencari anak lelaki mereka yang tidak pulang ke rumah. PW1 mengatakan bahawa mereka sedang berdiri di hadapan Ta Kiong apabila sekumpulan orang datang dekat mereka dan salah seorang lelaki dalam kumpulan yang bertanyakan tentang suaminya 'cari apa bos?' dan suaminya menjawab yang mereka sedang mencari anak lelaki mereka. PW1 mengatakan bahawa orang itu tiba-tiba memukul suaminya di muka menggunakan topi keledar menyebabkannya jatuh telentang di atas jalan. PW1 menjadi takut dan melarikan diri. PW1 memberi keterangan bahawa apabila dia melihat ke belakang, dia nampak seseorang memegang kayu dan kesemua mereka memijak suaminya yang terlantar atas tanah. Dia berkata yang dia lari ke Mastama Inn yang berdekatan di mana dia berjumpa seorang lelaki tua berbangsa Melayu yang memberinya telefon bimbit yang digunakannya untuk memanggil anak perempuan memintanya memanggil polis. Apabila PW1 kembali ke tempat kejadian, suaminya telah meninggal dunia. Inti pati pembelaan adalah sama ada PW1 telah mengecam dengan betul ketujuh-tujuh orang yang dituduh sebagai orang-orang yang menyebabkan kecederaan ke atas si mati pada malam tersebut. PW1 memberi keterangan bahawa dia telah mengenalpasti tujuh orang tertuduh itu semasa barisan pengecaman yang dilakukan oleh polis. Kes pendakwaan bergantung secara keseluruhan atau sebahagian besarnya atas ketepatan atau sebaliknya pengecaman terhadap tertuduh oleh PW1. PW5 ('seorang pegawai polis') telah menyoal siasat tertuduh pertama dan PW5 mengatakan bahawa tertuduh pertama memberitahunya 'saya telah memukul mangsa dengan topi keledar saya yang sekarang berada di rumah, saya boleh menunjukkan tempatnya'.

Diputuskan, melepas dan membebaskan tertuduh-tertuduh:

(1) Mahkamah harus berhati-hati dalam menentukan sama ada PW1 telah mengecam dengan betul atau membuat apa-apa kesilapan dalam pengecaman orang-orang tertuduh sebagai kumpulan orang yang telah menyerang si mati pada malam itu; *R v Turnbull and others* [1976] 3 All ER 549 dan *Thenegaran a/l Murugan & Anor v Public Prosecutor* [2013] 2 MLJ 855 dirujuk (lihat perenggan 14).

(2) Garis panduan kes *Turnbull* telah dinyatakan dalam ujian tiga langkah. Persoalan pertama yang patut disoal oleh seorang hakim di mana terdapat keterangan pengecaman adalah sama ada kes terhadap tertuduh bergantung secara menyeluruh atau sebahagian besarnya atas ketepatan keterangan pengecaman itu yang mana dikatakan oleh pembelaan adalah satu kesilapan. Jika begitu, persoalan kedua adalah sama ada keterangan pengecaman itu berkualiti baik, dengan mengambil kira keadaan di mana pengecaman oleh saksi itu dibuat. Di mana kualiti keterangan pengecaman tidak kukuh, hakim patut meneruskan dengan soalan ketiga iaitu sama ada terdapat keterangan lain yang boleh menyokong ketepatan pengecaman itu. Jika hakim tidak dapat menemui keterangan lain yang

menyokong keterangan pengecaman, beliau hendaklah berhati-hati bahawa sabitan yang bergantung kepada keterangan pengecaman yang tidak kukuh adalah tidak selamat; *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142 dan *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49 dirujuk (lihat perenggan 15).

(3) PW1 tidak dapat memberikan jarak tepat antara dia dan kumpulan orang itu apabila dia melihat ke belakang semasa dia berlari. Dia tidak memberi keterangan bahawa dia mampu atau boleh mengecam atau menggambarkan mana-mana daripada mereka daripada jarak itu. PW1 tidak mengetahui mana-mana daripada mereka dalam kumpulan itu. Mereka memang orang asing kepadanya. Semasa keterangannya di mahkamah dia menuding jari kepada kesemua tertuduh yang duduk dalam kandang tertuduh sebagai mereka yang bertanggungjawab kerana kematian suaminya. PW1 tidak dan tidak boleh secara berasingan mengenalpasti setiap tertuduh dalam kandang tertuduh itu. PW1 juga tidak dan tidak boleh mengenalpasti orang-orang yang memijak suaminya atau orang yang membawa kayu itu (lihat perenggan 19–21 & 23).

(4) PW1 memberi keterangan bahawa salah seorang daripada mereka dalam kumpulan itu telah memukul suaminya dengan topi keledar putih semasa dia melarikan diri, dia melihat kumpulan orang ini memijak suaminya dan salah seorang daripada mereka membawa kayu. Walau bagaimanapun, PW1 dalam laporan polisnya menyatakan bahawa selepas suaminya menjawab 'cari anak', kumpulan orang lelaki itu dengan segera memukul suaminya menggunakan topi keledar dan kayu. Selepas itu mereka bergelut dan dia melarikan diri. Apa yang dinyatakanya dalam laporan polisnya berbeza dengan keterangannya. PW1 dan pendakwaan tidak menjelaskan percanggahan tersebut. Ini menimbulkan keraguan serius tentang keterangannya berhubung kejadian pada malam itu, termasuk pengecamannya terhadap kumpulan orang yang menjadi inti pati kes pendakwaan terhadap tujuh orang tertuduh itu (lihat perenggan 37–39).

(5) Selanjutnya, PW1 memberi keterangan bahawa selepas dia keluar dari Mastama Inn, dia telah berjumpa dengan seorang lelaki tua berbangsa Melayu yang menolongnya dengan memberi telefon bimbitnya untuk dia memanggil anak perempuannya. 'Old Malay man' yang dikatakan ini adalah PW6, yang merupakan seorang pengawal keselamatan dan hanya berumur 23 tahun. Dia tidak mungkin adalah 'old Malay man' itu. Sekali lagi ini menimbulkan keraguan tentang pengecaman atau pengenalpastian orang olehnya (lihat perenggan 40).

(6) PW5 tidak memberi keterangan tentang persoalan yang dikemukakan kepada tertuduh pertama olehnya yang membuatkan tertuduh pertama memberitahunya bahawa tertuduh pertama telah memukul mangsa

dengan topi keledar. Apa yang dikatakan oleh kedua-dua mereka semasa soal siasat itu tidak ditulis atau dirakam. Walaupun ia tidak diperlukan untuk ditulis atau dirakam, mahkamah patut lebih berwaspada dalam memastikan kebolehpercayaan keterangan oleh anggota polis yang terdedah kepada penyalahgunaan; *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 dirujuk (lihat perenggan 49).

(7) PW5 telah ke rumah tertuduh pertama untuk merampas motorsikal dan topi keledar berdasarkan maklumat yang diberikan oleh tertuduh pertama. Maklumat ini boleh diterima di bawah s 27 Akta Keterangan 1950 ('Akta'). Bahagian pertama kenyataan 'saya telah memukul mangsa dengan topi keledar saya' tidak perlu untuk maklumat itu yang secara jelas membawa kepada penemuan dan rampasan topi keledar itu. Bahagian pertama kenyataan itu bukan dalam skop s 27 Akta tersebut, adalah memudaratkan dan juga tidak boleh diterima di bawah s 113(1) Kanun Tatacara Jenayah (lihat perenggan 50).

(8) Pendakwaan tidak mengemukakan apa-apa motif untuk serangan yang mengakibatkan kematian si mati. Tidak terdapat keterangan bahawa tujuh orang tertuduh itu telah membentuk apa-apa niat bersama atau apa-apa motif untuk mencederakan si mati atau menyebabkan kematian si mati (lihat perenggan 59).]]

Notes

For a case on information leading to fact discovered, see 7(1) *Mallal's Digest* (5th Ed, 2015) para 133.

For cases on quality of identification evidence, see 7(2) *Mallal's Digest* (5th Ed, 2015) para 2267–2275.

For cases on s 302, see 4(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1899–2031.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49, FC (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)
Heng Aik Ren Thomas v PP [1998] 3 SLR(R) 142, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
R v Turnbull and others [1976] 3 All ER 549, CA (refd)
Sum Kum Seng v PP [1981] 1 MLJ 244, FC (refd)
Thenegaran a/l Murugan & Anor v PP [2013] 2 MLJ 855, CA (refd)

Legislation referred to

Criminal Procedure Code ss 113(1), 180
Evidence Act 1950 s 27

Penal Code ss 34, 302

Hairun Najmi bin Mashahadi (Deputy Public Prosecutor, Attorney General's Chambers) for the complainant.
Rosali Gapor for the first, second and fourth accused.
Musa Dinggat for the third accused.
Shamsulbahri bin Saperi for the fifth accused.
John Antau for the sixth accused.
Hii Chee Wung for the seventh accused.

Stephen Chung J:

[1] The seven accused persons have been charged for causing the death of Nabinoh ak Meta ('the deceased') under s 302 read with s 34 of the Penal Code. The charge reads as follows:

> Bahawa kamu bersama-sama pada 27 September, 2012 jam lebih kurang 12.00 tengah malam bertempat di kawasan meletak kenderaan di hadapan kedai Ta Kiong, Jalan Pasar Malam Bintulu di dalam Daerah Bintulu didalam Negeri Sarawak, bagi mencapai niat bersama kamu semua, telah membunuh Nabinoh Anak Meta (L) (No. KP :tiada) dan dengan itu kamu semua telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[2] In his opening statement, the learned DPP submitted that the prosecution would adduce evidence from one eye witness to prove that all the accused had caused the death of the deceased. The DPP submitted that the evidence would show that all the accused had common intention of causing bodily injuries to the deceased and that the injuries inflicted were sufficient in the ordinary course of nature to cause death to the deceased. The DPP submitted that the prosecution would rely on the post-mortem report to prove the injuries inflicted on the deceased.

[3] The duty of a judge, sitting alone at the close for the prosecution is to determine as a trier of facts whether the prosecution has made out a prima facie case against the accused. The judge must subject the evidence of the prosecution to a maximum evaluation: *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734.

[4] 'PW1' is the wife of the deceased and the only eye witness called to prove that the seven accused persons were responsible for the death of the deceased. She testified that on 27 September 2012, at about midnight, when she was in her cousin's house, she received a phone call from her husband telling her that their son Tommy had not returned home and that they should go and look for him at the *pasar malam* Bintulu, near to Ta Kiong Supermarket. PW1 testified

that she went with her husband to the *pasar malam* to look for their son but they did not see him there. Then they went to Ta Kiong Supermarket.

[5] PW1 said that when they were standing in front of Ta Kiong, they saw a group of people coming from a fun fair towards them. PW1 said that when the group came near to them, one of the male persons asked her husband in Bahasa Melayu 'cari apa boss?' and her husband answered that they were looking for their son. PW1 said that person suddenly hit her husband on the face using a helmet. After being hit, her husband fell on his back onto the road. She was scared and ran away from them. She said she looked back and one of them called out to her not to run away but she continued running away because she was scared that they might kill her or injure her.

[6] She said she went to Mastama Inn, which was near to Ta Kiong to seek help but the persons at the counter of the Inn told her that they dared not interfere or help her. Then she met an old Malay man outside the Inn who gave his mobile phone to her to make a call to her daughter asking her daughter to call the police. She said she told her daughter that her father had been hit.

[7] PW1 testified that she went back to the place where her husband was lying on the road after he had been hit. She said there were members of the public present and she found that her husband was still breathing. After the police and ambulance arrived she was told that her husband had died.

[8] It was not in dispute that the deceased had been assaulted, had sustained injuries in front of Ta Kiong Supermarket and had died from his injuries on that night. 'PW7', a pathologist from Sarawak General Hospital, performed an autopsy on the deceased at Bintulu Hospital mortuary on 28 September 2012 at 11.30am. The deceased was identified by PW1 at the autopsy. PW7 had prepared a post-mortem report on the autopsy which was tendered as exh P30.

[9] PW7 testified that on examination of the deceased she found 25 external injuries to the head, neck and body of the deceased. These injuries sustained by the deceased included a linear laceration to both eyebrows, a torn wound on the left cheek, a torn wound on the right cheek, linear torn wound to both cheeks below the eyes, the cartilage of the nose was broken, bruises to the lips and tram line bruises to the chest.

[10] She testified that the internal injuries included bruises to the brain beneath the skull, a fracture to the fossa anterior of the skull, bruises to the front of the brain, bruises to the tissues of the cheeks and the maxilla bone to the right cheek was broken. PW7 said that the facial injuries sustained were due to trauma blunt object. She said these injuries were serious to cause death due to the broken nose, multiple broken teeth, a fracture to the cheek and torn lip

which caused bleeding which blocked the trachea and flooded the lungs with blood which choked the deceased.

[11] The question is whether the seven accused persons had inflicted the injuries which caused the death of the deceased. PW1 had testified that all the accused were responsible for the death of her husband. The crux of the prosecution's case is whether PW1 had correctly identified the seven accused persons as the persons who had inflicted the injuries on the deceased on that night.

[12] As stated above, PW1 testified that one of the persons in the group, which approached her and the deceased near to Ta Kiong, had spoken to the deceased and suddenly used a helmet to hit the face of the deceased. She said her husband fell down and she ran away because she was afraid that they would also assault and injure her. While she was running away, she turned to look back and she saw this group of persons stepping on her husband who was then lying on the ground.

[13] PW1 testified that she could identify the persons who assaulted her husband that night. PW1 testified that she had also identified the seven accused during identification parades conducted by the police. During the trial PW1 pointed to the accused persons sitting in the dock as the persons who were responsible for the death of the deceased.

[14] In this case the defence has challenged the identification of all the accused by PW1 to have been mistaken or wrong or incorrect. The prosecution's case depended wholly or substantially on the correctness or otherwise of the identification of the accused by PW1. On the facts and circumstances in this case, the court should warn itself whether PW1 had correctly identified or made any mistake in the identification of the accused persons as the group of persons who had assaulted the deceased on that night: see *R v Turnbull and others* [1976] 3 All ER 549 and *Thenegaran a/l Murugan & Anor v Public Prosecutor* [2013] 2 MLJ 855.

[15] The courts in this country have applied the *Turnbull* guidelines. From the several cases cited, the *Turnbull* guidelines have been distilled into a three-step test. The first question which a judge should ask where there is identification evidence is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken. If so, the second question is whether the identification evidence is of good quality, taking into account the circumstances in which the identification by the witness was made. Where the quality of the identification evidence is poor, the judge should go on to ask the third question ie whether is there any other evidence which goes to support the

correctness of the identification. If the judge is unable to find other supporting evidence for the identification evidence, he should be mindful that a conviction which relies on such poor identification evidence would be unsafe: see *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142 and *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49.

[16] The defence submitted that PW1 was not able to identify this group of persons in front of Ta Kiong as the accused on that night because the lights in the vicinity were dim or not bright enough to enable PW1 to clearly see the accused persons' face. The evidence showed that PW1 and her husband went to Ta Kiong from the *pasar malam* at about midnight. Both the *pasar malam* and Ta Kiong were closed at that time. The evidence showed that there were some street lights in the vicinity where the assault took place and the street lights were dim or not very bright. PW1 testified that there was a street light about twenty feet from them at the time this group of persons approached them in front of Ta Kiong. The evidence showed that the police photographer required flashlights to take the photographs at the scene due to the dim street lights at the vicinity.

[17] The evidence showed that this group of persons was coming from the direction of *pasar malam* which was very dark because there were hardly any street lights in the *pasar malam*. PW1 testified that she could not see the face of this group of persons when they were approaching her and her husband. PW1 could not identify or describe any of them at that time and from that distance.

[18] PW1 said that when this group of persons approached them and one of them talked to her husband, this group of persons were about 2–3 mt from them. When this person talked to her husband, she moved backward. Suddenly this person hit her husband with a helmet and she ran away. She was asked and she said she saw their face but she only took a glance at them and then she ran away. She said this happened very fast, within 5–10 seconds before she ran away. PW1 testified that she did not know how many persons were in this group but all she knew was that they were all males.

[19] The evidence showed that she took a glance at the persons and then she ran away as soon as her husband was hit with the helmet. She only turned her head to look while she was running towards Mastama Inn to get help. She could not give the approximate distance between her and this group of persons when she glanced back to look while she was running. PW1 testified that when she glanced or looked back, she saw a person was holding a stick and all of them were stepping on her husband who was then lying on the ground after he was hit with the helmet. She did not testify that she was able or could identify or describe any of them from that distance.

[20] The evidence showed that PW1 did not know any of these persons who were approaching her and her husband on that night in front of Ta Kiong. PW1 had never seen or met any of them before that night. They were complete strangers to her.

[21] The evidence showed that PW1 was not sure how many persons were in this group who had assaulted her husband. She said there were at least seven persons and might be more than that in the group but she was not sure. During her testimony in court she pointed to all the accused persons who were sitting in the dock as the persons who were responsible for the death of her husband. The evidence showed that PW1 did not and could not separately identify each of the accused in the dock.

[22] PW1 was then asked by the DPP and she pointed to the first accused as the person who had hit her husband with the helmet. In her cross-examination she was asked how did she know or how could she identify the first accused and PW1 said it was based on instinct because her husband was hit by a person from the group of persons and this person used a white helmet to hit her husband. She said she was sure because it was a white helmet.

[23] The evidence showed that PW1 did not and could not separately identify the persons who had stepped on her husband or the person who was carrying a stick. The evidence showed that she did not and was not able to describe any of the seven accused who had hit or stepped on her husband.

[24] Although PW1 had said that there were more than seven persons in the group, she did not explain whether any of these other persons in the group had also hit or assaulted or stepped on her husband. She did not explain whether she was able to identify any of these other persons in the group besides the seven accused whom she alleged were responsible for the death of her husband. She did not explain what happened to these other persons in the group, whether they were arrested or included in the line up in the identification parades conducted by the police and whether she was able to identify any of these other persons whom she said were in the group of more than seven persons in the identification parades.

[25] The evidence showed that the police conducted three identification parades for PW1 to identify the persons who were suspected to have caused the death of her husband. The first identification parade was conducted on 1 October 2012 at 4pm at the Central Police Station ('CPS'), Bintulu, by 'PW3'. PW3 spoke to PW1 in Bahasa Melayu and no interpreter was required to assist them in the identification parades.

[26] PW3 testified that PW1 could not see any of the persons in the line up

before the identification parade because she was in another room and he did not show any photograph of any of the suspects or accused to PW1 before the identification parade. PW3 also said that PW1 did not ask for nor did he show any composite photograph from photo-fit prepared by the police prior to the identification parade. PW3 prepared a report of the identification parade conducted by him. The report was tendered and marked as exh P13.

[27] Exhibit P13 showed that there were twenty male persons including the first accused, the second accused and the seventh accused standing in the line up in the identification parade for PW1 to identify the suspects who were alleged to be responsible for the death of her husband. PW1 testified that each person in the line up was asked to hold a number in their hands in front and each number represented their respective position in the line up. She said she was told that some suspects might or might not be included in the line up. PW1 was told by PW3 that if she could identify any suspects in the line up, then she should point to the number in front of the persons whom she had identified. PW1 testified that at the time of the identification the persons in the line up were in a separate room whereas she was in an adjoining room where she could see them through a one-way mirror but could not hear their voices or their conversations.

[28] In the identification parade, the first accused was standing in position number sixteen, the second accused was in position number six and the seventh accused was in position number two. PW1 and PW3 testified that some of the persons were wearing RELA uniform, some wearing RELA shirts and some wearing RELA trousers. PW3 presumed they belonged to RELA. PW1 was not sure whether these persons were RELA members. The inference could be drawn was that they were RELA members and she might be influenced by their presence in the line up. PW3 testified that none of the suspects or accused in the line up asked to change their positions in the line up prior to PW1 was asked to identify any suspects.

[29] PW3 testified that none of the suspects or accused asked for the composition of the persons in the line up to be changed. PW3 in exh P13 stated that none of the three accused in the line up did not make any change in the composition or their position in the line up for the identification parade. Exhibit P13 showed that PW1 identified the first, second and seventh accused in the identification parade.

[30] PW3 conducted the second identification parade on the same day ie 1 October 2012 at 4.15pm at CPS Bintulu, on the same terms and conditions set out in P13. PW3 prepared a report of the identification parade. The report was tendered and marked as exh P14. P14 showed that there were 15 male persons including the fourth and fifth accused in the line up in this second

identification parade. Eleven persons in the first identification parade were included in the second identification parade including some in RELA uniform. The fourth accused was standing in position number five whereas the fifth accused was standing in position number eight in the line up. Exhibit P14 showed that PW1 identified the fourth and the fifth accused in the identification parade.

[31] PW3 conducted the third identification parade on the same day ie 1 October 2012 at 4.30pm at CPS Bintulu, on the same terms and conditions as set out in P13. PW3 prepared a report on the third identification parade conducted by him. The report was tendered and marked as exh P15.

[32] Exhibit P15 showed that 15 male persons including the third and sixth accused were in the line up in this identification parade. Out of these 15, six persons who were in the first and second identification parades were included in this third parade; two persons who were in the first identification parade but not in the second identification parade were included in this third identification parade; two persons who were in the second identification parade were included in this third parade; similarly some were in RELA uniform and lastly, the fourth and fifth accused who were in the line up in the second identification parade were also included in this third identification parade. The third accused was standing in position number seven and the sixth accused was standing in position number nine in this line up.

[33] Exhibit P15 showed that PW1 identified the third and sixth accused in this third identification parade. However, although the fourth and fifth accused persons were included in the line up, PW1 did not identify them or point at them as the suspects or the accused who were responsible for the death of her husband or whom she had identified in the second identification parade. If she had already identified the fourth and fifth accused at the second identification parade, she could and should be able to pick them out or identify them again at the third identification parade. The evidence showed that PW1 did not inform PW3 that she could recognise or identified the fourth and fifth accused in the line up. She remained silent about this and it raised serious doubts whether she could actually identify the fourth and fifth accused, either during the second or the third identification parades.

[34] The evidence showed that PW1 was not able to identify the fourth and the fifth accused during the third identification parade. The question is, notwithstanding her mistaken identification of the fourth and fifth accused, whether she had positively identified the first, second, third, sixth and seventh accused. Notwithstanding that PW1 had pointed to all the accused persons sitting in the dock in court during the trial as the persons responsible for the death of her husband, PW1, being cross-examined, testified that she was not

able to identify any of the accused in court as the persons whom she had identified during the identification parades because it was long ago. She said they looked different now in court, they had shorter hair and fairer.

[35] Although PW1 had pointed to all the accused in court and had previously identified them during the identification parades, from the evidence adduced by the prosecution, PW1 was not able to positively identify any of the seven accused persons. This was also confirmed in her police report (exh P3) made a few hours after the incident on that night.

[36] In her report, PW1 said that 'di sebelah supermarket Tai Kiong, tiba-tiba telah didatangi oleh sekumpulan lelaki dipercayai berbangsa Melayu yang tidak dikenali ...'. What she said in her police report raised doubts on her identification or the quality of her identification of the seven accused persons, bearing in mind at those material times she did not know them, had never seen them before and had only a glance of their face during those 5–10 seconds in dim street lights at night, before she ran away. Subsequently during the identification parades and subsequently in court, PW1 did not testify or explain that since she had lodged the police report that she was subsequently for good reasons able to identify all or any of the accused persons, either during the identification parades and or in court.

[37] As stated above, PW1 had testified that one of the persons in the group had hit her husband with a white helmet and while she was running away she saw this group of persons step on her husband and one of them was carrying a stick. However, PW1 in her police report stated that after her husband had replied 'cari anak', this group of male persons immediately hit her husband using a helmet and wood. After that they struggled and she ran away.

[38] What she had said in her police report contradicted her evidence during her testimony. Her police report was made shortly after the incident. The incident should be fresh in her mind when she made the report and it should be more accurate. However, PW1 repeatedly said that this group of persons stepped on her husband which was not stated in the report. PW1 in her testimony said that she did not see any person using any wood or stick to hit her husband whereas she reported that this group used a helmet and wood to hit her husband. PW1 also did not testify that there was a struggle between his husband and this group of persons but it was stated in her report.

[39] PW1 and the prosecution did not explain these discrepancies. These led to the inference that either she was not telling the truth or that her recollection was flawed so that her testimony was not true or not correct. In any event it raised serious doubts on her testimony of the incident on that night, including her identification of this group of persons which was the crux of the

prosecution's case against the seven accused persons. A

[40] Further, PW1 had testified that after she came out of Mastama Inn, she met an old Malay man who helped her by giving his mobile phone for her to call her daughter. This allegedly 'old Malay man' is PW6, who was a security guard and 23 years old only. He could not be that 'old Malay man'. It again raised doubts on her identification or recognition of persons involved in this case. B

[41] The next question is whether there was any evidence to corroborate the identification of the accused or whether they were the persons responsible for the death of the deceased. C

[42] The evidence showed that 'PW12', who was a police officer, was passing by the *pasar malam* on that night. He saw a group of persons who were loitering, standing near to some motorcycles, at the *pasar malam*. He suspected the motorcycles to belong to this group of persons and he decided to record the registration plate number of one of the motorcycles. He said he could not recognise or identify these persons. D

E

[43] 'PW5' was one of the police officers who attended at the crime scene after the police received a report of an assault on a person. Shortly after, the police checked with the JPJ data on the registration number of this motorcycle which was recorded by PW12 as a possible lead in the police investigation. The JPJ data showed that the motorcycle was registered in the name of the first accused and with his address. F

[44] 'PW10' a police officer, testified that he received an information that a motorcycle with registration number QTJ 6617 was seen leaving the scene of the crime. He was asked and he said he received the information from PW12. However, PW12 did not testify that he saw the motorcycle QTJ 6617 leaving the scene of the crime. What PW12 did was to randomly record the registration number of this motorcycle and passed the number to his colleague. Therefore what PW10 had said that the motorcycle QTJ 6617, later confirmed to be registered under the name of the first accused, was seen to be leaving the scene of the crime could not be true. G H

[45] At about 2am, shortly after the deceased had been taken to hospital, PW5 led a team of police officers to the address of the first accused, based on the JPJ data, to arrest the first accused as a suspect in the case. After his arrest the first accused was brought back to CPS Bintulu. PW5 made a report of the arrest of the first accused which was tendered and marked as exh P19. PW5 said he interrogated the first accused about the incident and the first accused told him that the first accused used the helmet to hit the victim. PW5 was then led by the I

first accused to his house to seize the motorcycle and the helmet. PW5 made a report on the seizure in P26.

[46] Earlier on that night, at the first accused's house, PW5 seized the clothes worn by the first accused. PW5 prepared a seizure list which was signed by him and the first accused which was tendered and marked as exh P25. The jeans, T-shirt, jacket, socks and a pair of shoes worn by the first accused on that night were tendered and marked as exhs P20B, P21B, P22B, P23B and P24B respectively.

[47] Learned counsel submitted that the alleged statement made by the first accused to PW5 that 'saya telah memukul mangsa dengan topi keledar saya' should be expunged and not admissible under s 27 of the Evidence Act 1950 ('the EA'). He also submitted that no caution was administered or given to the first accused before the interrogation.

[48] Once an information is proved to be within the province of s 27 of the EA, the court will admit it in evidence notwithstanding that the information may not be given voluntarily: *Sum Kum Seng v Public Prosecutor* [1981] 1 MLJ 244 and *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507. The information must be such as has caused discovery of the fact and the information must relate distinctly to this fact.

[49] The evidence showed that PW5 interrogated the first accused and PW5 said that the first accused told him 'saya telah memukul mangsa dengan topi keledar saya yang sekarang berada di rumah, saya boleh menunjukkan tempatnya'. PW5 did not testify what were the questions put to the first accused by him which made the first accused tell him that the first accused had hit the victim with the helmet. What were said by both of them during the interrogation were not written down or recorded. Although it was not required to be written down or recorded, the courts should be vigilant to ensure the credibility of evidence by the police personnel which is so vulnerable to abuse: *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137.

[50] The evidence showed that PW5 went to the house of the first accused to seize the motorcycle and the helmet based on the information given by the first accused. However, the second part of that statement was the information which led to the discovery and seizure of the motorcycle and the helmet. This part of the statement was the information that distinctly led to the discovery of the helmet. This information was admissible under s 27 of the EA. The first part of the statement 'saya telah memukul mangsa dengan topi keledar saya' was not necessary to the information that distinctly led to the discovery and seizure of the helmet and not admissible under s 27 of the EA. The first part of the statement was not within the province of s 27 of the EA, was prejudicial and

not also admissible under s 113(1) of the CPC.

[51] Further, it should be noted that although PW5 seized the motorcycle and helmet from the house of the first accused on 27 September 2012 at about 3am, he did not prepare any seizure list whereas on 27 September 2012 at about 2am, when PW5 seized the clothes that the accused was wearing on the same night, he had prepared a seizure list. No explanation was given by PW5 or the prosecution on this omission. This raised a suspicion that the first accused did not tell PW5 that he had hit the victim with the helmet or that he was forced to do so.

[52] The evidence showed that PW5 had arrested the first accused shortly after incident in his house. PW5 had seized the clothings and shoes worn by the first accused on that night. There was no evidence that he had changed his clothes or that he had washed the clothes that he had worn earlier that night. The clothes and shoes seized were sent to the chemist for analysis. The chemist report (P58) stated that there was no blood detected on the clothes and shoes belonging to the first accused. There was also no evidence that the DNA of the deceased had been detected on the clothes and shoes.

[53] Similarly there was no evidence that the first accused had cleaned or washed the helmet or had wiped any DNA from the helmet. P58 stated that no DNA of the deceased was detected or found on the inner of the helmet or the outer of the helmet. This contradicted the testimony of PW1 that the first accused had used the helmet to hit the deceased on that night and again this raised serious doubts on the identification of the first accused by PW1 that he was the person who had hit the deceased with the helmet.

[54] The evidence showed that on 27 September 2012, at about 1pm, the police arrested the third, fourth, fifth, sixth and seventh accused (see police report P43). On 30 September 2012 at about 12.45pm at CPS Bintulu, 'PW11' together with some police personnel interrogated the seventh accused. PW11 testified that the seventh accused told him that 'tuan saya boleh tunjuk kasut saya pakai terajang si mati'. This was reported in the police report (P51) which led to the discovery and seizure of the pair of shoes (P31B) (see police report P50).

[55] Similarly, the seventh accused submitted that what he allegedly told PW11 'saya pakai terajang si mati' was not admissible. For the reasons given above, the statement 'saya pakai terajang si mati' was not admissible under s 27 of the EA. This statement was not necessary and was not the information leading to the discovery of the shoes. The information that led to the discovery and seizure of the shoes was the statement 'tuan saya boleh tunjuk kasut saya pakai'. This was admissible under s 27 of the EA.

[56] The statement 'saya pakai terajang si mati' was prejudicial and an attempt by the prosecution to link the seventh accused to the assault on the deceased on that night by a group of persons. Although PW1 had testified that this group of persons had stepped on her husband, she had contradicted herself by her police report in which she did not say that this group of persons had stepped on her husband. What she had said in her police report contradicted what PW11 had said in the police report that the seventh accused had told PW11 that he had stepped or kicked the deceased on that night.

[57] PW7 had testified that, during the post-mortem, she did not see or find any shoe marks on the body of the deceased. She did not find any external injury to the body of the deceased caused by any shoe mark worn by an assailant. She was shown P31B by DPP and she said she could not confirm that the shoes had been used to step on the deceased's face. In any event she did not see any sole print mark on the deceased's face. This piece of evidence also contradicted the fact that the seventh accused and or any of the group of persons had stepped or kicked the accused when he was lying down on the road in front of the Ta Kiong. The police report of PW1 confirmed that none of the persons in the group had stepped or kicked the deceased.

[58] Apart from the allegations made against the first and seventh accused, which were not true, there was no allegation made against the other accused. Based on the evidence adduced by the prosecution, there was not sufficient evidence to identify and to link the seven accused persons in causing the death of the deceased on that night in front of Ta Kiong. PW1 could not positively identify the accused persons as the group of persons on that night in front of Ta Kiong to have caused the death of the deceased.

[59] Although PW1 alleged that one of the persons in the group had suddenly hit the deceased with a helmet, she did not and could not give any explanation why this person or group of persons had suddenly and for no reason assaulted her husband. The prosecution did not adduce any motive for the assault which had resulted in the death of the deceased. There was no evidence that the seven accused had formed any common intention or any motive to inflict injuries on the deceased and in causing the death of the deceased.

[60] On the totality of the evidence before the court, the prosecution has not adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction: see s 180 of the CPC and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301. Therefore the prosecution has not made out a prima facie case against each and all of the seven accused persons to have committed the offence for which they were charged.

[61] For the reasons given, all the seven accused persons are acquitted and discharged of the offence for which they were charged under s 302 of the Penal Code in this case.

Accused persons acquitted and discharged.

Reported by Kanesh Sundrum